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SELECTED ISSUES UNDER THE NEW RULES OF CIVIL PROCEDURE

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Professor Flanagan and Chief Deputy Attorney General Sloan served as reporters to the Circuit Court Rules Study Committee that drafted the new South Carolina Rules of Civil Procedure. The views expressed here are the authors' and do not necessarily reflect the views of the Committee.

I. INTRODUCTION

The new South Carolina Rules of Civil Procedure, which became effective on July 1, 1985, provide the first extensive revision of procedure since 1870. Although they adopt the format, numbering, and, in many instances, the language of the federal rules, they retain certain features of prior South Carolina proce-

dure, such as fact pleading and discovery limitations. The result is a combination of the best parts of both systems.

The drafters of the new rules participated in a series of seminars that concentrated on the operation of the rules in the circuit courts and the major innovations in the new procedure. These seminars, as well as comments by numerous lawyers and judges, suggested the need to explore in greater detail the ambiguities in the service of process and discovery rules, the application of the new rules to inferior courts, and the relationship of the rules to appellate practice.

The first section of this article will address certain ambiguities in the new rules. One issue raised by the rules concerns the amount of time permitted for answering service by mail. Consideration of this problem will both illustrate the interrelationship of the rules and demonstrate how examining the rules' history and appropriate federal precedent can help resolve apparent ambiguities. Another area of uncertainty is found in the language that the drafters added to the discovery rules. Although prior practice and federal precedent do not provide any guidelines for solving these problems, a careful reading of the rules and a logical approach can produce a suitable resolution.

The second section will consider the relationship of the new circuit court rules to the lower courts and the masters in equity. The circuit courts are part of a unified judicial system and must function in harmony with all types of inferior tribunals. As a result, the circuit court rules will affect all South Carolina courts to some degree. Reconciling the procedure found in the new rules with existing statutes and rules of the various courts is a complex process; consequently, rule 81, on the applicability of the rules, and rule 53, dealing with masters, will be discussed in detail.

The final section will examine the interaction between the circuit courts and the appellate courts. Although the rules were drafted for the trial courts, language in the rules on post-trial motions and in rules 52 and 72 can be interpreted as changing appellate practice in significant respects. The discussion here is not so much on the language, but on the proper scope of the rules and the supreme court's intent in adopting them.

II. AMBIGUITIES IN THE SERVICE OF PROCESS AND DISCOVERY RULES

A. Rule 6(e)

Rule 6(e) provides:

> Additional Time After Service by Mail or Upon Statutory Agent. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail or upon a person designated by statute to accept service, five days shall be added to the prescribed period.[1]

The language of this rule is the same as in the 1958 Judicial Council draft[2] and differs only slightly from the comparable federal rule,[3] which does not contain the phrase "or upon a person designated by statute to accept service." The South Carolina drafters provided little guidance on the operation of the rule: the 1958 Judicial Council draft notes neither refer to the added language nor explain its operation,[4] and the advisory committee note to new rule 6(e) is no more informative.[5] In addition, there is no advisory committee note on the federal rule, which has remained unchanged since its adoption.[6] The most immediate is-

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1. RULE 6(e), SCRCP.

2. Draft Rules of Civil Procedure were prepared by the Judicial Council of South Carolina and submitted to the South Carolina General Assembly in 1958. They passed the house, but failed in the senate by one vote. They were reintroduced in the senate the following year and died in committee. Interestingly, many individuals involved in this first attempt to change code pleading were instrumental in the recent successful amendment, most notably former Chief Justice C. Bruce Littlejohn, who, as a circuit judge, chaired the 1958 committee, and Frank K. Sloan, who was the reporter for both committees.

3. FED. R. CIV. P. 6(e).

4. The 1958 Judicial Council draft provided only the following commentary:

> Rule 6(e) is identical with the Federal rule. Section 10-465, S.C. Code, 1952 [S.C. CODE ANN. § 15-9-950 (1976)(repealed 1985)] allows "double the time," a provision not entirely clear. Priester v. Priester, 131 S.C. 284, 127 S.E. 18 (1925). The addition of three days [now five days] is commensurate with modern mail communication service. Code Section 10-465 should be repealed.

RULE 6, SCRCP note 5 (Jud. Council Draft 1958).

5. "This Rule 6(e) is the same as the Federal Rule except that the additional time to take an act after service is by mail is increased from 3 to 5 days. This replaces the very unclear meaning of Code § 15-9-950." RULE 6(e), SCRCP advisory committee note.

6. J. MOORE, J. LUCAS, H. FINK & C. THOMPSON, MOORE'S FEDERAL PRACTICE ¶

sue raised by this rule is whether a party served with a summons and complaint pursuant to rule 4(d)(8) is entitled to an additional five days to answer or otherwise plead. A second question is whether the reference to service on statutory agents means that the additional time is available only when the agent is served by mail or whether any service on a statutory agent triggers the rule. Finally, it is uncertain how rule 6(e) affects the computation provisions in rule 6(a).

1. Whether a Party Served with a Summons and Complaint by Mail Is Allowed Additional Time to Respond

Service of the summons and complaint by mail is an innovation. Until recently only rule 5 mentioned service by mail, and its operation was clear because it was limited to papers and notices other than the initial summons and complaint. Rule 5(a) requires that those papers be served upon all parties except those in default. Rule 5(b) requires that this service be upon counsel rather than upon the parties and permits service by mail. When service is by mail, the date a notice is mailed and the date it is received are, of course, different. The last sentence of rule 5(b) establishes the decisive date: "Service by mail is complete *upon mailing* of all pleadings and papers subsequent to service of the original summons and complaint."[7] Although the mailing date completes service, the period for response is shortened by the amount of time the notice or demand is in the mail. This delay is particularly troublesome when the period to respond is only seven or ten days. Rule 6(e) adds an additional five days to the response period, thus compensating the responding party for the travel time of the mail[8] and providing approximately the same time to respond as if personal service had been made.

As a result, although a pleading subsequent to the summons and complaint, such as an answer and counterclaim, is timely if mailed on the thirtieth day after *personal* service of the sum-

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6.01[13] (2d. ed. 1985)(hereinafter cited as MOORE'S FEDERAL PRACTICE).

7. RULE 5(b), SCRCP (emphasis added).

8. FED. R. CIV. P. 6(e) provides for an additional *three* days when service is accomplished by mail.

mons and complaint,[9] under rule 6(e) the response would be timely if made within thirty-five days after the mailing date, regardless of the date of actual receipt.[10] Similarly, a party served by mail with a request to produce under rule 34[11] or with a motion for summary judgment under rule 12(c)[12] would have an additional five days to respond after the mailing of the request.[13] The question remains, however, whether a party served by mail with a summons or complaint is also entitled to an additional five days to respond.

Prior to 1983, the federal rules did not authorize service of the summons and complaint by mail; thus, the question of whether federal rule 6(e) extended the time to answer did not arise. In general, the date of the receipt of the summons and complaint was decisive for calculating the time to respond.[14] Therefore, even if mailing had been authorized, no need existed for additional time to respond because the period would have commenced upon receipt rather than upon mailing. Similarly, prior South Carolina law specifically excluded the service of a summons and complaint from the addition of "double time" after service by mail.[15]

Thus, in its original context, federal rule 6(e) did not apply to the computation of time for responding to a summons and complaint. Federal case law limited the effect of rule 6(e) to

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9. RULE 12(a), SCRCP.

10. 2 MOORE'S FEDERAL PRACTICE, *supra* note 6, ¶ 5.07.

11. Under RULE 34(b), SCRCP, a party has 30 days to respond after being served with a request to produce.

12. Under RULE 12(c), SCRCP, a party has 15 days to respond after being served with a motion for summary judgment.

13. *Cf.* Gutwein v. Roche Labs., 739 F.2d 93 (2d Cir. 1984).

14. *Cf.* Norris v. Florida Dep't of Health and Rehabilitative Servs., 730 F.2d 682 (11th Cir. 1984)(since 90-day period for filing employment discrimination complaint commences upon receipt of right-to-sue notice, rule 6(e) does not add to the statutory time period).

15. *See* S.C. CODE ANN. §§ 15-9-950, -1030 (1976) (repealed 1985). Prior state law did present one situation that created problems. S.C. CODE ANN. § 15-9-350 (1976) designates the Chief Highway Commissioner as agent for nonresident motorists and motor carriers for the purpose of receiving the summons and complaint. Pursuant to S.C. CODE ANN. § 15-9-370 (1976), the Chief Highway Commissioner, upon receipt of the documents, mails them to the defendant. In Ward v. Miller, 230 S.C. 288, 95 S.E.2d 482 (1956), the South Carolina Supreme Court held, on the basis of statutory language, that service was effective upon receipt by the agent and that the "double time" provision for extending the time to answer did not apply. This interpretation reduced the actual time available for the defendant or his insurance carrier to respond, leading to unnecessary defaults.

matters of procedure rather than substance. Federal precedent did not extend the time to take action when a statute or the entry of the judgment or order commenced the time for action,[16] even though notice typically was given by mail.[17]

In 1983 the United States Supreme Court submitted to Congress proposed changes to federal rule 4, which authorized service of the summons and complaint by mail under certain circumstances.[18] Objections to portions of the proposed draft led to congressional amendments designed to reduce the work load of the marshal's service.[19] There was no discussion of the relationship between service by mail and federal rule 6(e) in either the proposed or the adopted version of federal rule 4. Certainly, no suggestion was made that rule 6(e) extended the time to respond when served by mail. Moreover, the new federal rule required the party served by mail to return an acknowledgement of receipt of the summons and complaint. Form 18-A clearly states: "If you do complete and return this form, you (or the party on whose behalf you are being served) must answer the complaint within 20 days. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint."[20]

The adoption of service by mail in the federal rules was not intended to extend the time to respond or otherwise plead in response to the complaint. In *Madden v. Cleland*,[21] the only federal decision that has explicitly examined this issue, the district

16. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Kurtenbach, 525 F.2d 1179 (8th Cir. 1979)(notice of appeal); Perrin v. Walker, 385 F. Supp. 945 (E.D. Ill. 1974)(petition for removal); McConnell v. United States, 50 F.R.D. 499 (E.D. Tenn. 1970)(post-trial motions). Occasionally, courts would apply the provisions of rule 6(e) to prevent an unnecessary loss of rights, but this was by analogy and only in the absence of any contrary state or federal statutes. *See, e.g.*, Baldwin County Welcome Center v. Brown, 104 S. Ct. 1723 n.1 (1984).

17. FED. R. CIV. P. 77(d) requires the clerk to notify counsel of the entry of orders, but the last sentence makes clear that the decisive moment is the entry of the order, regardless of the actual knowledge of counsel or the failure of the clerk to mail the notice. New RULE 77(d), SCRCP reflects an earlier version of the federal rule and does not contain this last sentence.

18. For text of the proposed amendments and advisory committee note, see 2 MOORE'S FEDERAL PRACTICE, *supra* note 6, ¶ 4.01[33.-2].

19. *See H.R. 7154—Federal Rules of Civil Procedure Amendments Act of 1982*, 97th Cong., 2d Sess., 128 CONG. REC. H9849 (daily ed. Dec. 15, 1982)(statement of Robert A. McConnell, Assistant Attorney General).

20. FED. R. CIV. P. Form 18-A (Notice and Acknowledgement by Mail).

21. 105 F.R.D. 520 (N.D. Ga. 1985).

court held that rule 6(e) did not apply when the summons and complaint were served by mail.[22] In *Burnam v. Amoco Container Co.*,[23] however, another district court, without analysis, added the three days provided for in federal rule 6(e) to the time for response to a complaint and vacated an entry of default as untimely.[24]

Service by mail of the summons and complaint is now authorized by South Carolina rule 4(d)(8). The language of this rule was taken largely from the version proposed by the United States Supreme Court, rather than the current federal rule 4(c)(iii).[25] The drafters of South Carolina rule 4(d)(8) modified and rearranged the language of the proposed rule[26] and inserted the following sentence: "Service is effective upon the date of delivery as shown on the returned receipt."[27] Rule 5(b)(1) provides: "Service by mail is complete upon mailing *of all pleadings and papers subsequent to service of the original summons and complaint.*"[28] The italicized portion does not appear in federal rule 5(b); its inclusion in the new rule further emphasizes the intent

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22. *Id.* at 525.

23. 39 Fed. R. Serv. 2d (Callaghan) 170 (N.D. Ga. 1984).

24. *Id.* at 170.

25. The major difference between the state and federal rules is that the state rule, following the Supreme Court's version, relies on the return receipt to establish acceptance of the process, while the federal rule requires return of FED. R. CIV. P. Form 18-A (Notice and Acknowledgement for Service by Mail).

26. The federal rule as proposed by the advisory committee read as follows:

> (8) Service of a summons and complaint upon a defendant of any class referred to in paragraph (1) or (3) of this subsection of this rule may be made by the plaintiff or by any person authorized to serve process pursuant to Rule 4(c), including a United States marshall or his deputy, by registered or certified mail, return receipt requested and delivery restricted to the addressee. Service pursuant to this paragraph shall not be the basis for an entry of a default or a judgment by default unless the record contains a return receipt showing acceptance by the defendant or a returned envelope showing refusal of the process by the defendant. If delivery of the process is refused, the person serving the process, promptly upon the receipt of notice of such refusal, shall mail to the defendant by first class mail a copy of the summons and complaint and a notice that despite such refusal the case will proceed and that judgment by default will be rendered against him unless he appears to defend the suit. Any such default or judgment by default shall be set aside pursuant to Rule 55(c) or Rule 60(b) if the defendant demonstrates to the court that the return receipt was signed or delivery was refused by an unauthorized person.

2 MOORE'S FEDERAL PRACTICE, *supra* note 6, ¶ 4.01[33.-2].

27. RULE 4(d)(8), SCRCP.

28. RULE 5(b)(1), SCRCP (emphasis added).

of the state rules to establish clearly that the date of receipt is the starting date for calculating the time to respond to a summons and complaint served by mail.

Since a defendant is given the full thirty days allotted by rule 12(a) to answer,[29] there is no justification for granting an additional five days to respond merely because the process was received through the mail rather than by personal delivery. In addition, federal rule 6(e) has always been read in conjunction with rule 5(b) to compensate for the time the "notices or papers" were in the mail. The specific exclusion of the summons and complaint, found in the last sentence of rule 5(b), strongly suggests that there was never any intention that rule 6(e) should apply to service of the summons and complaint. Thus, the structure of the state rules, and particularly the changes made from the federal model, support the conclusion that rule 6(e) has nothing to do with the calculation of the time to respond to a summons and complaint served by mail.

2. *When Service on a Statutory Agent Allows Additional Time to Respond*

The second question created by rule 6(e) is whether the additional time to respond applies to all service made on statutory agents or only to service made by mail. As noted above, neither the 1958 Judicial Council draft nor the 1985 rules are of any help in interpreting the rule's language.[30] To the extent that an inference can be drawn from the language of the rule,[31] the use of the disjunctive "or" suggests that the rule applies in both situations. It is perhaps more persuasive that the relevant language first appeared in the 1958 Judicial Council draft only two years after the decision in *Ward v. Miller*,[32] in which the South Carolina Supreme Court held that the "double time" provision for service by mail did not apply when service was made upon an official designated by statute to receive service of summons. Several code sections designate various officials as agents to receive

29. FED. R. CIV. P. 12(a) provides for only 20 days to answer after service of the summons and complaint.

30. *See supra* notes 2-5 and accompanying text.

31. For text of rule 6(e), see *supra* text accompanying note 1.

32. 230 S.C. 288, 95 S.E.2d 482 (1956). *See supra* note 15.

the summons and complaint,[33] and this service is effective upon delivery to the official who is required to mail the process to the defendant.

Although the official is served by personal delivery, the actual litigant receives notification by mail. The time to answer or otherwise plead runs while the summons is in the mail. This method of service, combined with only a twenty-day period to respond[34] and the courts' reluctance to open default judgments,[35] often caused litigation to terminate without ever reaching the merits. In this context, reading the language as adding an additional three days or five days[36] would reasonably compensate for the loss of time between receipt by the statutory agent and actual receipt by the defendant.

Finally, the alternative reading of the rule—that the extension of time applies only when the summons and complaint is served by mail—does not make sense in light of the conditions prevailing in 1958, when the language of the rule was first drafted. Service on a statutory agent was effective then only if made by delivery to the designated agent; the agent could then use the mail to notify the defendant.[37] Thus, service on a statutory agent was not technically service by mail. Actual service by mail was not authorized until the 1985 rules. To read rule 6(e) as applicable only in cases of service by mail on statutory agents, when no such service was permitted at the time of the rule's drafting, would render the language meaningless. For these reasons, rule 6(e) should be read to add an additional five days whenever a statutory agent is served by either method.[38]

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33. *See, e.g.*, S.C. CODE ANN. § 15-9-240 (Supp. 1984)(Secretary of State agent for nonresident corporations not licensed to do business in state); S.C. CODE ANN. § 15-9-270 (Supp. 1984)(Chief Insurance Commissioner agent for insurance companies); S.C. CODE ANN. § 15-9-350 (1976)(Chief Highway Commissioner agent for nonresident motorists).

34. S.C. CODE ANN. § 15-13-310 (1976)(repealed 1985). In 1982 the South Carolina Supreme Court, citing its inherent rulemaking power, changed to 30 days the time allotted to answer or otherwise plead. RULE 12(a), SCRCP provides for the same 30 days.

35. *See* H. LIGHTSEY & J. FLANAGAN, SOUTH CAROLINA CIVIL PROCEDURE 398-404 (1985).

36. The additional period is five days under RULE 6(e), SCRCP, but was three days in the 1958 draft.

37. *See* statutes cited *supra* note 33.

38. RULE 6(e), SCRCP does not define a "statutory agent," but in light of the remedial purposes of the rule, it should include any agent whose authority to accept service is required by statute, whether the defendant actually knows and designates the agent under S.C. CODE ANN. § 33-5-40 (1976) or the agent is personally unknown to the defen-

3. *Computation of the Time for Response*

One final issue raised by rule 6(e) concerns the method of computing the total time available for response under rule 6(a). Rule 6(a) provides:

> Computation. In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday or a State or Federal holiday, in which event the period runs until the end of the next day which is neither a Saturday, Sunday nor such holiday. When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays and holidays shall be excluded in the computation. A half holiday shall be considered as other days and not as a holiday.[39]

Under one view, the additional five days would be added to the originally authorized time and the resulting period treated as one unit for purposes of rule 6(a). Alternatively, the original time and the additional five days could be treated as separate periods under that rule. If the second method is used, the time might be substantially extended.

For example, assume that the thirty days to answer interrogatories served by mail expires on Friday, July 4. Under the first method, the periods are added together to produce a total of thirty-five days, which expires the following Wednesday, July 9. Under the second method, the thirtieth day falls on a holiday and rule 6(a) extends the time to the next day that is not a holiday, Saturday, or Sunday; thus, the original time expires on Monday, July 7. If the time under 6(e) is added at that point, the time to respond is extended to July 12, a Saturday, and extended again by rule to Monday, July 14.

A similar problem occurs under rule 6(a) if the time allowed is less than seven days. This situation should not occur routinely because rule 6(d) requires ten days notice of a motion.[40] If, how-

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dant and appointed solely by law, as under S.C. CODE ANN. § 15-9-350 (1976)(nonresident motorists).

39. RULE 6(a), SCRCP.

40. *See also* RULE 30(b)(1), SCRCP (10 day notice of deposition), RULE 56(c),

ever, a court ordered a shorter period, rule 6(a) would exclude intervening Saturdays, Sundays, and holidays, and the same issue would arise. If, for example, on July 1 the court orders a response within five days and the order is served by mail, then, if the original five days and the rule 6(e) five days are treated as separate periods, fifteen days are given for the response because one holiday and two weekends are not counted. On the other hand, if one ten-day period is authorized, the time expires on July 10 because no holiday or intervening weekend is counted. While federal precedents can be found to support both interpretations, the commentators, as well as prudence, suggest that the first approach, producing one combined time period measured from the date of mailing, is the preferred construction. As a practical matter, however, it is better to assume that the time set by the court is a fixed period and the intervening weekend and holiday are not counted.

B. Service of "Process" Under Rule 4(c)

Rule 4(c) states:

> By whom served. Service of summons may be made by a sheriff, his deputy, or by any other person over eighteen (18) years of age, not an attorney in or a party to the action. Service of all other process shall be made by the sheriff or his deputy, except that a subpoena may be served as provided in Rule 45.[41]

This section is an amalgam of the provisions of the 1958 Judicial Council draft, the existing federal rule, and the prior South Carolina Code.[42] Despite the statement in the note accompanying rule 4(c) that the new rule "continues present state practice,"[43] it does introduce some changes.

1. Service of Summons and Complaint

Like the Judicial Council draft, this version prohibits the parties' attorneys from serving the summons and complaint. Neither the earlier draft nor the notes to the new rules provide

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SCRCP (10 day notice for summary judgment).

41. RULE 4(c), SCRCP.

42. *See* S.C. CODE ANN. § 15-9-40 (1976)(repealed 1985).

43. RULE 4(c), SCRCP.

any explanation for this change. The change appears to have been made to avoid the possibility that an attorney be required to recuse himself if called upon to testify when the validity of service is challenged.[44] Although this problem may have arisen only infrequently under prior practice, the new rule eliminates it entirely. Since the rule allows service by any nonparty over eighteen years of age, no hardship in completing service should result. Interestingly, parties who are forbidden by rule 4(c) from serving the summons and complaint by other means of service may do so by mail under rule 4(d)(8), which specifically permits plaintiffs to serve a summons and complaint by registered mail.

The first sentence of rule 4(c) deletes a phrase found in the prior statute allowing service "by the sheriff *of the county in which the defendant may be found* . . . ."[45] This change suggests that a sheriff may serve a summons and complaint in a county other than the one where he holds office. Normally, however, service in other counties may be made more easily by civilians.

2. *Service of Subpoenas*

The service of subpoenas under rule 45(c) differs somewhat from the summons and complaint service set out in rule 4(c). Rule 45(c) provides that "[a] subpoena may be served by the sheriff of any county in which the witness may be found, by his deputy or by any other person who is not a party and is not less than 18 years of age."[46] Thus, a subpoena, unlike a summons and complaint, may be served by a party's lawyer or by an eighteen-year-old.[47] In addition, the inclusion of the qualifying language "sheriff of any county in which the witness may be found" suggests a geographical limitation on the power of sheriffs to serve subpoenas. Finally, the last sentence of rule 45(c) specifically permits service of subpeonas on Sunday, in contrast to sec-

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44. *See* S.C. SUP. CT. R. 32, DR 5-101, -102.

45. S.C. CODE ANN. § 15-9-40 (1976)(repealed 1985)(emphasis added). The Judicial Council draft was similar and stated "by the sheriff of *any* county in which the defendant may be found . . . ." RULE 4(c), SCRCP (Jud. Council Draft 1958)(emphasis added).

46. RULE 45(c), SCRCP.

47. Under RULE 4(c), SCRCP, the server of a summons must be *over* 18 years of age. For text of the rule, see *supra* text accompanying note 41.

tion 15-9-1010 of the South Carolina Code,[48] which authorized Sunday service only for attachments.

3. *Service of "Other Process"*

The second sentence of rule 4(c) is more troublesome because it requires the sheriff to serve all "other process" without providing any definition of the term "process." Moreover, the advisory committee note states that rules and orders must be served by the sheriff, which imposes a much greater burden on sheriffs than under prior practice.

The term "process" is very broad. In *Royal Exchange Assurance v. Bennettsville & Cheraw Railroad*,[49] the South Carolina Supreme Court, after reviewing the definitions offered by various treatises, concluded:

> In its general acceptation [process] means a writ, a summons, or order issued in a judicial proceeding to acquire jurisdiction of a person or his property, to expedite the hearing of the cause to a final determination, or to enforce the judgment of the Court. A complaint is a mere pleading and does not partake of these characteristics.[50]

Professor Moore defined "process" as "a judicial document, such as a summons, notice, writ, or order, by means of which a court exercises its jurisdiction over a party or property."[51] Certain documents clearly constitute process because they are critical to obtaining jurisdiction over a person or property. These include the summons (to which the complaint must be attached), subpoenas, attachments, seizures in claim and delivery actions, arrests, and executions. None of these "processes" creates a problem under rule 4(c) because it is clear that summonses and subpoenas may be served freely and that statutes compel the sheriff to serve the other documents.[52]

The real question is whether such documents as temporary

48. S.C. CODE ANN. § 15-9-1010 (1976)(repealed 1985).

49. 95 S.C. 375, 79 S.E. 104 (1913).

50. *Id.* at 379, 79 S.E.2d at 105.

51. 2 MOORE'S FEDERAL PRACTICE, *supra* note 6, ¶ 4.02[1].

52. S.C. CODE ANN. §§ 15-17-70 (1976)(arrest and bail in civil actions), 15-19-230 (1976)(attachment), 15-39-80 (1976)(executions and judicial sales), 15-69-50 to -60 (1976)(seizure in claim and delivery actions).

restraining orders, injunctions, and the more routine orders in litigation must be served by the sheriff. As suggested by the note, orders fall within the definition of "process" because they expedite the case and assist the court in its exercise of jurisdiction over persons and property. Yet, as the court in *Royal Exchange Assurance* noted, "The word 'process' has been variously defined, for reasons that the context generally plays an important part in its construction."[53] The context, or reason for requiring service by an official, throws some light on what constitutes "process" within the meaning of rule 4(c). Although no guidance is furnished by the notes to these rules or to the Judicial Council draft, the advisory committee notes to a similar provision, now found in federal rule 4(c)(1), provide some help. These notes state that "forms of process which require an enforcement presence, such as temporary restraining orders, injunctions, attachments, arrests, and orders relating to judicial sales shall be served by marshals, their deputies, and persons specially appointed by the court."[54]

The primary policy underlying service by an enforcement officer is the desire that an official represent the courts in obtaining custody and disposing of the person or property. This policy is reflected in statutes that prescribe the procedure and conduct to be followed by the sheriff in executing orders. A secondary justification is the need for an official presence to insure compliance with the order and to avoid conflict between the litigants.

The argument for an enforcement presence does not apply to routine orders in civil litigation. These civil orders do not require an official presence for taking custody of or disposing of property. Similarly, this type of order does not engender the resistance that requires a peace officer. Finally, counsel would normally have notice of civil orders through presence at court, service by opposing counsel under rule 5, or notice from the clerk

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53. 95 S.C. at 379, 79 S.E. at 105.

54. FED. R. CIV. P. 4 advisory committee note (Proposed Amends. 1981). The United States Supreme Court submitted to Congress several proposed amendments to federal rule 4, including provisions for service of summons and complaint by mail. Congress rejected these amendments and enacted its own legislation, which achieved the objective of the court's proposed amendments. The provision on service of process, now found in federal rule 4(c)(1), was enacted as proposed. *See generally* 2 MOORE'S FEDERAL PRACTICE, *supra* note 6, ¶ 4.01[33].

under rule 77(d). Thus, it is unnecessary to use the sheriff to insure actual notice.

The enforcement rationale suggests that restraining orders, including the temporary restraining order (TRO), are different from other forms of process and do not require service by the sheriff. Further, no clear authority restricts service of the TRO to the sheriff.[55] In fact, prior practice sanctioned the use of private process servers, particularly where speed was necessary.

The TRO is analytically different from other types of process. While the summons (with the complaint attached) is the essential process for acquiring jurisdiction over the person, the TRO is an exercise of jurisdiction already acquired. The TRO does not require the same functions of custody and disposal as attachments and executions. Thus, the TRO seems more like a routine order.

There are also two practical reasons for concluding that official service of a TRO should not be required. First, the TRO is an *ex parte* ancillary remedy designed to preserve the status quo. Under the new rules, the action is not commenced by "a rule to show cause," but by service of the summons and complaint.[56] Normally, then, the TRO would be served either with or after the summons and complaint. Since original process can be served by anyone who is not an attorney or party to the action, no rule prevents the TRO from being served by an authorized person at the same time. Second, once jurisdiction has been acquired, service of a TRO is not essential to bind a person; actual notice of the order is sufficient.[57] It follows that the recipient of a summons and complaint with a TRO attached would have actual notice and be bound regardless of whether or not the rule technically requires that a sheriff make service. If so, requiring service by a sheriff seems a useless formality. The same argument applies to a temporary injunction: because it is issued only after notice and a hearing, the restrained party or his representative would necessarily have actual notice of the order.

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55. The notes to these rules and also to the Judicial Council draft refer to S.C. CODE ANN. § 15-9-1020 (1976)(repealed 1985) and imply that sheriffs must serve all process. That section, however, prohibits the taxation of costs for service of process not made by the sheriff in the county where it was served.

56. RULE 65(b), SCRCP & advisory committee note.

57. *See* RULE 65(d), SCRCP.

This analysis suggests that nothing inherent in a TRO requires service by the sheriff. No statutory duties or obligations are attached to the TRO. Certainly, the court has the power to order service by the sheriff in appropriate situations.[58] In light of prior practice, which did not require a sheriff's service, there is little reason to demand this procedure under the new rules.

As this article was being prepared, the supreme court submitted proposed amendments to the general assembly. If not disapproved by a three-fifths vote of each house, the second sentence of rule 4(c) will be amended to read:

> Service of all other process shall be made by the sheriff or his deputy, or any other duly constituted law enforcement official or by any person designated by the court who is not less than eighteen (18) years of age and not an attorney in or a party to the action . . . .

This new language should resolve the problems inherent in the original language of the rule.

C. *Discovery Issues*

1. *The Amount in Controversy*

The new rules retain certain monetary limitations on the use of discovery methods. Depositions are available only in cases exceeding $10,000.[59] The same is true of general interrogatories, although a proposed amendment would raise the figure to $25,000. Videotaped depositions and medical examinations are obtainable only in cases over $100,000.[60] Consequently, the prayer for relief will normally determine the discovery available as a matter of right.

Rule 8(a)(3) permits pleading of actual damages in a sum certain or in a general prayer, but requires that punitive damages be pled "in general terms only and not for a stated sum."[61]

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58. *Cf.* RULE 4(e), SCRCP (allowing service on a party not residing in or found in state under the circumstances and in the manner prescribed by statute, rule, or order).

59. RULES 30(a)(2), 33(b)(8), SCRCP.

60. RULES 30(h)(1), 35(a), SCRCP.

61. RULE 8(a)(3), SCRCP. A proposed amendment would add to rule 8(a) the following language: "provided, however, a party may plead that the total amount in controversy shall not exceed a stated sum which shall limit the claim for all purposes." This change, if adopted, will permit a plaintiff to plead, for example, that actual and punitive

Thus, when no specific sum is set forth, the defendant has the task of determining what discovery is available. The easiest means of accomplishing this is to serve the plaintiff with a discovery request. The plaintiff will then be forced either to comply with the request or to move for a protective order on the ground that the limited amount in controversy precludes availability of the particular discovery sought. In either event, a record on the critical issue will be made. Alternatively, the defendant could use a simple interrogatory or request to admit, but these devices are generally time-consuming. Finally, the defendant could arrange an informal agreement with opposing counsel, but some written confirmation of the agreement must be preserved if it is to be binding on the parties.[62]

It is not clear whether claims for punitive damages may be considered in determining the amount in controversy. Initially, it would appear that they may not. Since only actual damages are pled in specific figures, there is no basis for assigning a value to the punitive damage claim at the discovery stage.[63] Careful examination of the language of the rules, however, reveals that they do not preclude consideration of the punitive damage claim. The rules limiting use of the various discovery methods to cases seeking a specific dollar amount speak, alternatively, of either the "amount in controversy" or the "prayer for relief."[64] This suggests that the total claim may be considered to determine the discovery methods available. As a practical matter, the issue may not present any real problem since all discovery procedures except the medical examination can be ordered by the court upon a showing of good cause.[65] Thus, in ambiguous cases the court can allow the amount and types of discovery it deems appropriate.

A related problem can arise when the jury returns a verdict exceeding the stated amount in controversy. If discovery was re-

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damages shall not exceed $9,999, thus limiting discovery. The pleading would control the final recovery.

62. RULE 43(k), SCRCP.

63. *See* H. LIGHTSEY & J. FLANAGAN, *supra* note 35, at 310-11.

64. RULE 30(a)(2), SCRCP (depositions upon oral examination), RULE 33(b)(8), SCRCP (standard interrogatories), and RULE 35(a), SCRCP (physical and mental examinations) speak in terms of the "amount in controversy." RULE 30(h)(1), SCRCP (videotaped depositions) refers to "the prayer for relief."

65. RULES 30(a)(2), 30(h)(1), 33(b), 35(a), SCRCP.

stricted because of the amount pled, should the recovery be limited to that amount? The simple answer—that the stated amount in controversy governs, as in prior practice,[66]—is inconsistent with rule 54(c). This rule provides that "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."[67] This language has been construed by the federal courts to permit the entry of judgment for an amount in excess of what was pled.[68]

The methods available for establishing the amount in controversy are not settled. As noted above, rule 54(c) implies that the pleadings are not binding on the amount recoverable. Answers to interrogatories or depositions are, likewise, not determinative, since they constitute mere evidence, which may be contradicted or rebutted by other evidence. On the other hand, an agreement between the parties may be a stipulation and, thus, binding on them. The same result may be achieved through a request to admit: since an admission is conclusive on an issue, it may not be contested by the admitting party.

The time when the issue of the amount in controversy is raised is important. If raised during the trial, the most closely analogous cases—those on amendments during trial[69]—suggest that the court would not permit the new claims despite the liberal language of rule 15(b) on amendments.[70] On the other hand,

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66. Gainey v. Gainey, 279 S.C. 68, 301 S.E.2d 763 (1983); Carolina Veneer & Lumber Co. v. American Mut. Liab. Ins. Co., 202 S.C. 103, 24 S.E.2d 153 (1943); Cummings v. Lawrence, 87 S.C. 457, 69 S.E. 1090 (1911). As in prior practice, a default judgment cannot exceed the amount pled. *Compare* RULE 54(c), SCRCP *with* S.C. CODE ANN. § 15-35-70 (1976)(repealed 1985). Under the proposed amendment to rule 8(a), if the pleading specifically contained a "not to exceed" figure, that amount would control. *See supra* note 61.

67. RULE 54(c), SCRCP.

68. 10 C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 2664 (1983)(hereinafter cited as WRIGHT & MILLER).

69. *See, e.g.*, Alamance Indus. v. Chesterfield Hosiery Mill, 239 S.C. 287, 122 S.E.2d 648 (1961). *See also* H. LIGHTSEY & J. FLANAGAN, *supra* note 35, at 288-89.

70. Rule 15 reads in part:

> 15(b). Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues.

if it is difficult to establish that the denied discovery would have benefited the party requesting it, then the principle of harmless error[71] argues for the change. If the issue is first raised after the verdict has been rendered, the court has sufficient power to order a *remittitur* if the verdict is excessive,[72] but not if the verdict is within the range of what the jury could reasonably have found.

The current rules provide no clear solution to this problem, and the proposed amendment to rule 8(a)[73] is only a partial solution. Yet so many tactical decisions are based on the amount in controversy that resolution of the issue is important. To make the amount pled nonbinding, except in cases of obvious abuse or harm to the party seeking discovery, would encourage sharp practice and lead to unnecessary litigation. The better course, therefore, is for counsel to insure that the respective parties treat the stated amount as binding for all purposes and that the court respect and enforce that decision. If the evidence adduced at trial would support a greater recovery than pled, the pleadings should be so amended pursuant to rule 15(b).

2. *The Summary of Knowledge Required by Rule 33(b)(7)*

The major change in the standard interrogatories, which are available in every case, is found in rule 33(b)(7), which states:

> For each person known to the parties or counsel to be a witness concerning the facts of the case, set forth either a summary sufficient to inform the other party of the important facts known to or observed by such witness, or provide a copy of any written or recorded statements taken from such witnesses.[74]

The purpose of this rule is to help identify critical fact witnesses and to focus discovery efforts with a minimum of time and effort. This provision furnishes a means of identifying the most knowledgeable witnesses and, thus, leads to a more timely and economical resolution of the case.

Rule 33(b)(7) appears to apply only to fact witnesses, not to

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RULE 15(b), SCRCP.

71. RULE 61, SCRCP.

72. H. LIGHTSEY & J. FLANAGAN, *supra* note 35, at 385.

73. For text of amendment, see *supra* note 61.

74. RULE 33(b)(7), SCRCP.

experts. These two classes of witnesses are frequently distinguished under the rules. They are subject to different standard interrogatories.[75] The language of rule 33(b)(7) specifically refers to a "witness concerning the facts of the case," the same designation used in rule 33(b)(1) to identify fact witnesses. In addition, rule 26(b)(4) explicitly treats the subject of expert witnesses and provides that they be subject to deposition in this state. The drafters specifically rejected the federal model,[76] which calls for an initial interrogatory followed by additional discovery if necessary. In practice depositions are almost always taken because interrogatories directed to an expert are not particularly useful.

Rule 33(b)(7) calls for a "summary sufficient to inform the other party of the important facts known to or observed by such witness[es] . . . ."[77] The advisory note provides the only guidance on the amount of detail required: "The rule requires a detailed summary so as to avoid the problem encountered with the interrogatories directed to experts in Federal Rule 26(b)(4)(A)(i) which often results in a short, vague summary of expected testimony."[78] Those summaries have tended to be conclusory and insufficiently informative.[79]

The phrase "facts known to or observed by such witness"

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75. RULE 33(b)(6), SCRCP, states: "List the names and addresses of any expert witnesses whom the party proposes to use as a witness at the trial of the case."

76. The federal rule provides:

> A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

FED. R. CIV. P. 26(b)(4)(B).

77. RULE 33(b)(7), SCRCP.

78. RULE 33(b), SCRCP advisory committee note.

79. For example, in Wilson v. Resnick, 51 F.R.D. 510 (E.D. Pa. 1970), the response was that

> [the expert] would testify on the question of whether plaintiff was treated in accordance with good, sound medical practice; that as to plaintiff's condition . . . any residual complaint would be more annoying than anything else; that there is no functional disability; that the care and treatment by Dr. Resnick was in accordance with good, sound medical practice.

Id. at 511. *See generally* Graham, *Discovery of Experts Under Rule 26(b)(4) of the Federal Rules of Civil Procedure: Part One, An Analytical Study*, 1976 U. ILL. L.F. 895, 929-30 (1976).

suggests that only direct evidence is sought. In addition, the interrogatory calls for "important" facts in summary form, implying that information is required only on the critical and relevant issues in the case. Significantly, the response does not hinge on the form of the interrogatory used. The responding party cannot hide any witness or testimony of a witness, and all important facts must be reported.

This rule gives the responding party the option of providing either a summary or a record of the witness' statement. The information provided will be the same regardless of the chosen method of compliance. The second sentence of rule 33(b) states that interrogatories are deemed to be continuing; thus information that comes to the attention of the party or counsel after the original answers to interrogatories "shall be promptly transmitted to the other party."[80] As a result, if an initial statement does not contain an important fact, it must be supplemented when the information becomes known to the party or counsel.

The final issue raised by the rule is how it is to be enforced when a party seeks to introduce testimony of an "important fact" not previously disclosed. The court clearly has inherent power to exclude the proffered testimony,[81] but the existence of the power does not mean that it must be exercised in every case.[82] In the analogous situation when parties have failed to identify witnesses, the federal courts have considered the parties' explanation for the omission, the nature of the testimony, the prejudice to the opposing party, the need for a continuance, and other relevant factors before deciding whether to admit or exclude the testimony.[83]

State precedents reflect a similar procedure. Witnesses have been excluded when there was a deliberate refusal to supply the requested information.[84] On the other hand, courts have sometimes permitted testimony when the opposing party knew of the witnesses' existence. It is significant, however, that these prior decisions permitted or excluded the witness' *entire* testimony.[85]

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80. RULE 33(b), SCRCP.

81. 8 WRIGHT & MILLER, *supra* note 68, § 2050.

82. *Id. See also* Laney v. Hefley, 262 S.C. 54, 202 S.E.2d 12 (1974).

83. 11 WRIGHT & MILLER, *supra* note 68, § 2950.

84. Morgan v. Carolina Door Prods., Inc., 281 S.C. 423, 315 S.E.2d 119 (1984); Moran v. Jones, 281 S.C. 270, 315 S.E.2d 136 (Ct. App. 1984).

85. Kirkland v. Peoples Gas Co., 269 S.C. 431, 237 S.E.2d 772 (1977); Martin v.

The question raised by rule 33(b)(7) is whether the witness can testify to specific facts not previously disclosed. Because the stakes are smaller, the court can afford to enforce the provisions of rule 33(b)(7) more strictly, particularly when the failure to disclose provides a party with a tactical advantage.

3. Medical and Physical Examinations

Rule 35(a) authorizes, for the first time, mental and physical examinations of a party or a person in the custody and control of another party. The provisions of this rule differ from those governing other discovery methods in at least three respects. First, the court's order for an examination may be issued upon "good cause shown."[86] Second, the rule does not permit the court to waive the amount in controversy.[87] Finally, the rule restricts the location of the examination, the persons who may attend, and the method by which it is to be conducted. These last restrictions are unparalleled in the federal rule.

The provisions of the second paragraph of rule 35(a), governing the location, persons in attendance, and method, are the most problematical. If the party to be examined requests, his own physician must be permitted to attend the examination. In addition, the court must schedule the examination in the county where either the person to be examined or his physician resides and must give "special consideration" to their convenience.

This rule presents a number of problems for the examining party. First, it entirely ignores the schedule of the examining physician. Second, the express language that the examination "must" take place in the county where the examined party or his physician resides could prevent the physician from employing diagnostic machinery or techniques not available in the specified county. Parties who happen to live in counties with unsophisticated medical services would be able to prevent any useful

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Dunlap, 266 S.C. 230, 222 S.E.2d 8 (1976). In Jackson v. H & S Oil Co., 263 S.C. 407, 211 S.E.2d 223 (1975), a divided court permitted an expert to testify although he was identified only at a late date and completed his examination two days before the trial. The decision was questionable and has been criticized. *See Practice and Procedure, Annual Survey of South Carolina Law*, 28 S.C.L. REV. 369, 380-84 (1976).

86. RULE 35(a), SCRCP.

87. *Compare* RULE 35(a), SCRCP *with* RULES 30(a)(2), 30(h)(1), 33(b)(8), 36(c), SCRCP.

medical examination and thus frustrate the purpose of the rule.

This result is unintended and unjustified. Language in the first paragraph of rule 35 clearly gives the court the authority to "specify the time, place, manner, conditions and scope of the examination and the person or persons by whom it is to be made . . . ."[88] Unfortunately, the opposition to medical exams when they were proposed in 1958 and the express language cited above argue against a flexible interpretation. Some relief may be found in the court's equitable powers to order discovery in special proceedings[89] or perhaps in its inherent authority to control its procedure and cases.[90] Commentators, however, have questioned a court's authority to rely on its inherent power when the rule itself imposes explicit limitations.[91] The most desirable course under the current rule is an agreement between the parties to waive these limitations pursuant to rule 29.[92] A proposed amendment to the second paragraph of rule 35(a) would resolve these problems by retaining the provisions on scheduling and location, but granting the court discretion to vary them in appropriate circumstances.[93]

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88. RULE 35(a), SCRCP.

89. *Ex parte* Goodyear Tire and Rubber Co., 248 S.C. 412, 150 S.E.2d 525 (1966).

90. Some states have held that the court has the inherent power to order medical examinations. *See, e.g.*, G. S. Ry. v. Hill, 90 Ala. 71, 8 So. 90 (1890). Before the federal rules were passed, the United States Supreme Court rejected the inherent power theory. *See* Union Pac. Ry. Co. v. Botsford, 141 U.S. 250 (1891). *See also* Witte v. Fullerton, 376 P.2d 244 (Okla. 1962); Williams v. Chattanooga Iron Works, 131 Tenn. 683, 176 S.W. 1031 (1915).

91. 8 WRIGHT & MILLER, *supra* note 68, § 2233.

92. Rule 29 provides:

> Unless the court orders otherwise, the parties may by written stipulation (1) provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions, and (2) modify the procedures provided by these rules for other methods of discovery, except that stipulations extending the time provided in Rules 33, 34, and 36 for responses to discovery may be made only with the approval of the court.

RULE 29, SCRCP.

93. The proposed language reads:

> The physician of the party to be examined may be present at the examination. Unless the parties agree, or the court for good cause shown determines otherwise, the examination shall be in the county where the person to be examined, or his physician resides, and special consideration shall be given to the convenience of the person to be examined and that of his physician in setting the time and place of the examination, and reasonable consideration shall be given to the convenience of the examining physician.

A different problem is created by the last sentence of rule 35(a): "Upon objection to the physician designated to make the examination, and if the parties shall fail to agree as to who shall make the examination the court may designate a physician; but the fact that a physician was so designated shall not be admissible upon the trial."[94] The effect of this provision is ambiguous because it does not specify what type of objection would trigger the court's appointment power. One possible interpretation is that the attorney for the examined party can object to the choice of physician on any ground. This view would give the examined party and his attorney an effective veto over the requesting party's expert and, thus, a measure of control over the presentation of the opposing party's case. Although it is generally held that there is no absolute right to have the examination conducted by a particular person, courts often follow the suggestion of the requesting party.[95] This is particularly true when the examined party's objection goes to the weight of the testimony rather than the qualifications of the physician or the conduct of the examination.[96] The proposed amendment to rule 35(a) requiring that the objection be "reasonable"[97] supports the view that the objection must be directed to the abilities of the examining physician or to the contemplated tests.

III. The Rules and the Inferior Courts

A. The Masters

Rule 53 governs the reference of issues to a master, referee, auditor, or examiner. In general, the circuit court, either in its discretion or by the parties' consent, can refer matters to a master for the taking of evidence or the determination of issues. References usually occur in nonjury cases, but can also be made in complex jury cases, subject to some restrictions discussed below.[98]

The order of reference determines the master's authority to

94. Rule 35(a), SCRCP.
95. 8 Wright & Miller, *supra* note 68, § 2234.
96. *See, e.g.*, Postell v. Amana Refrigeration, Inc., 87 F.R.D. 706 (N.D. Ga. 1980).
97. For text of the proposed amendment, see *supra* note 93.
98. *See infra* text accompaning notes 111-14.

decide the issues referred. This order may permit the master to make findings of fact and conclusions of law that are subject to review and modification by the circuit judge; or the order may state that pursuant to rule 53(e)(4) the parties have stipulated that the master's findings of fact are final and the court may decide only questions of law.[99] The order may also permit the master to direct the entry of judgment based upon his findings of fact and conclusions of law. The procedure for taking exceptions to the master's report and appealing any decision based on the report is determined by the extent of the authority delegated to the master. Each of these options will be considered separately.

1. *Findings of Fact and Conclusions of Law in Nonjury Trials*

Assuming that the master is limited to making either findings of fact only or both findings of fact and conclusions of law, rule 53(e)(1) requires the master to prepare and file with the clerk a report on the matters submitted. The form of the report is within the discretion of the master, but rule 52(a) suggests that the master should draw separate findings of fact and conclusions of law.[100] Under rule 53(e)(5), the master can request draft reports from counsel or submit draft reports to counsel for comment. Unless otherwise stated in the order of reference, the completed report must include the proceeding's transcript, evidence, and original exhibits. If required by the order, the report may include findings of fact, conclusions of law, and a recommended judgment.[101]

The clerk is required to notify all parties by mail when the report has been filed,[102] unless the master has already notified

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99. RULE 53(e)(4), SCRCP, provides in part: "[W]hen the parties stipulate that a master's findings of fact shall be final, only questions of law arising upon the report shall thereafter be considered."

100. This rule provides in part:

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon . . . . The findings of a master, to the extent that a court adopts them, shall be considered as the findings of the court.

RULE 52(a), SCRCP.

101. RULE 53(e)(1), SCRCP.

102. *Cf.* Rule 77(d)(requiring the clerk to notify the parties of an entry of order or

them in writing. Thereafter, counsel has ten days to "serve notice of intention to take exceptions" to the master's report.[103] After serving the notice of intention to file exceptions, counsel has an additional thirty days to serve the exceptions or have them deemed abandoned.[104] Rule 5(d) requires the notice and exceptions to be filed with the court.

The master's report does not become effective automatically. Although the clerk may be expected to schedule a hearing on the exceptions on the nonjury calender, counsel must be aware that rule 53(e)(2) requires both a motion under rule 6(d) for action upon the report or upon the exceptions and a hearing by the court on the report.[105] In the absence of an exception, the report becomes the law of the case.[106] Under rule 53(e)(2), the court has authority to adopt, modify, or reject the report in whole or in part, to take additional evidence, or to recommit it with additional instructions. Further authority for this extensive review is found in Code section 14-11-90,[107] which makes orders of the master "subject to the revision of the presiding judge at the next succeeding sitting of the court . . . ."[108] Unlike its federal counterpart, rule 53 does not require that the master's findings be accepted unless clearly erroneous.[109]

Once the circuit judge has reviewed the master's report and either accepted or rejected its conclusions, the judge enters the appropriate judgment pursuant to rule 58, and the matter proceeds as in any other civil action in circuit court. Counsel has ten days from the entry of the judgment to file motions attacking the judgment.[110] Until resolved, these motions stay the time for appeal. Once a final order has been entered, counsel has ten days from the receipt of notice of the filing of the judgment to file and serve notice of intention to appeal, and that procedure follows the normal course of an appeal.

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judgment).

103. RULE 53(e)(2), SCRCP.

104. *Id.*

105. 9 WRIGHT & MILLER, *supra* note 68, § 2612.

106. Welborn v. Page, 247 S.C. 554, 148 S.E.2d 375 (1966).

107. S.C. CODE ANN. § 14-11-90 (Supp. 1984).

108. *Id.*

109. *Compare* RULE 53(e)(2), SCRCP *with* FED. R. CIV. P. 53(e)(2).

110. *See* RULES 52, 59, SCRCP.

2. *Reference in Jury Cases*

References are permissible in jury cases, but can be expensive and dilatory. Further, findings of the master are only evidentiary and not conclusive. Consequently, rule 53(b) limits references to those jury cases in which the issues are complicated. Reference in a jury case does not violate the right to jury trial because the jury may accept or reject the findings.[111]

Although not explicitly stated in the rule, the parties apparently must consent to a reference in a jury case. The first sentence of rule 53(b) makes the court's ability to order a reference discretionary, even if the parties consent, and permits the clerk to order a reference in a default case. The second sentence addresses references in jury cases and sets forth the complexity requirement and the limitations on and effect of the master's findings.[112] The third sentence states that "[i]n all other actions the court may upon application of any party or upon its own motion direct a reference of all or any of the issues, whether of fact or law."[113] The juxtaposition of the last two sentences and the introductory phrase "in all other actions" suggest that a reference cannot be made in a jury case solely upon the application of a party or a motion of the court.[114] Once the master's conclusions are presented to the jury, the case and appeal, including the post-trial motions, proceed as in ordinary jury cases.

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111. *See Ex parte* Peterson, 253 U.S. 300, 310-11 (1920); 5A MOORE'S FEDERAL PRACTICE, *supra* note 6, ¶ 53.14[3].

112. This sentence reads: "In actions to be tried before a jury, a reference shall be made only when the issues are complicated, and the findings of the master as to matters of fact shall be received as evidence only, in accordance with these rules." RULE 53(b), SCRCP.

113. *Id.*

114. Two other provisions deserve mention. RULE 53(e)(3), SCRCP covers the manner in which the master's conclusions are conveyed to the jury and expressly directs the master not to report the evidence underlying these conclusions. The master's testimony has been likened to that of an expert witness. 5A MOORE'S FEDERAL PRACTICE, *supra* note 6, ¶ 53.14[4]. RULE 53(e)(4), SCRCP states that the effect of the master's report is the same whether or not the parties consented to the reference. This language is taken from the comparable federal rule, where it was included to overrule early federal case law holding that the findings were entitled to greater weight when the reference was by consent. *Id.* ¶ 53.15. As an evidentiary provision, it has no bearing on the question of consent to a reference.

3. *Binding Effect of Master's Conclusions*

Rule 53(e)(1) states that "if the parties consent in writing or the order of reference so provides, [the master] shall direct entry of judgment in the action without further order of court."[115] Thus, after the filing of the report, the master could direct the clerk to enter judgment pursuant to rule 58. The final sentence of rule 53(e)(2) provides that the entry of judgment triggers the post-trial appeal rights of the parties: "In actions where judgment is entered on the master's report, the provisions of Rules 50, 52, 59, and 60 shall apply as in actions tried by the court without a jury; and right of appeal from the judgment shall lie as from a judgment of the court."[116]

Rule 53 does not explicitly state whether the post-trial motions are to be heard by the master or the circuit judge. Since the post-trial motions generally address legal issues, perhaps these motions should be submitted to the court; on the other hand, if the judge hears the motions, the process will become more complex, a result that the parties and the court intended to avoid when they agreed to make the master's findings conclusive. Moreover, the master is more knowledgeable about the individual case. If the circuit judge is required to familiarize himself with the record and contentions of the parties, further delay would inevitably ensue. The last sentence of Code section 14-11-90[117] suggests another argument that the master should hear the post-trial motions. This section provides: "Appeals from final judgment entered by a master pursuant to § 15-31-10 [repealed May 21, 1985] shall be to the circuit court unless otherwise directed by order of the circuit court or by consent of the parties."[118] This language reinforces the intent of rule 53(e)(2) that when judgment is entered directly on the master's report, review by the circuit court is not required; consequently, post-trial motions should be heard and decided by the master who directed the entry of judgment.

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115. RULE 53(e)(1), SCRCP. Compare S.C. CODE ANN. § 14-11-90 (Supp. 1984), which provides in part: "Final orders based on reports of masters shall be executed by circuit judges except where the master enters final judgment pursuant to provisions of § 15-31-10 [repealed 1985]."

116. RULE 53(e)(2), SCRCP.

117. S.C. CODE ANN. § 14-11-90 (Supp. 1984).

118. *Id.*

If the master is authorized to enter a final judgment, he may do so in either of two situations: if no post-trial motions have been made or if the motions made have been resolved. If post-trial motions have been entered, the time for appeal is stayed pending their resolution.[119] The time for filing the notice of intention to appeal commences only upon receipt of notice of the final judgment. Unless further steps are taken, the final judgment entered by the master would be appealed to the circuit court pursuant to section 14-11-90.[120]

Under rule 53(e)(2) and section 14-11-90, as well as former section 15-31-10,[121] review by the circuit court can be avoided if the parties explicitly agree that the master's decision will be appealable directly to the supreme court. Either the reference order or the parties' agreement must provide, in writing,[122] for the entry of a final judgment by the master and for a direct appeal. In addition to saving time, direct appeal has the advantage of increasing the available scope of review because the "two judge rule" does not apply and the appellate court is, therefore, free to render a decision based on its view of the preponderance of the evidence.[123]

This discussion has so far addressed the powers of the master. The first sentence of rule 53, however, states that the term "master" includes a referee, an auditor, and an examiner. This language may overrule the recent decision in *Luck v. Pencar, Ltd.*,[124] in which the South Carolina Court of Appeals held that the specific language of section 14-11-90 authorized a direct appeal only from the decision of a master, not from the decision of a referee,[125] even if the parties agree to the entry of a final

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119. *See* RULES 50(e), 52(c), 59(f), SCRCP. *See also supra* text accompanying note 110.

120. If the order of reference authorizes the master to enter a final judgment without a written consent to a direct appeal, the statute requires that the appeal be to the circuit court. Glass v. Glass, 278 S.C. 527, 299 S.E.2d 693 (1983). It is unclear how the circuit court's review of the final order of the master would differ from review of a nonfinal master's report.

121. S.C. CODE ANN. § 15-31-10 (Supp. 1984)(repealed 1985).

122. Precision Power Co. v. Adams, 283 S.C. 553, 325 S.E.2d 59 (1983).

123. For an explanation of the "two-judge" rule, see *infra* text accompanying note 172.

124. 282 S.C. at 643, 320 S.E.2d 711 (Ct. App. 1984). For a discussion of *Luck*, see *Practice and Procedure, Annual Survey of South Carolina Law*, 37 S.C.L. REV. 165, 188-89 (1985).

125. 282 S.C. at 645, 320 S.E.2d at 712.

judgment by the referee and a direct appeal.[126] If the rule 53 definition of "Master" is read in conjunction with the statute, it may be inferred that the master's and referee's decisions should be treated identically. This interpretation is certainly consistent with the intent of both the rules and the statutory scheme. As the court of appeals noted in *Luck*,[127] Code section 14-11-60[128] provides that the special referee shall "be clothed with all the powers of a master,"[129] and section 15-31-150[130] states that he "shall have the same authority"[131] as a master.

The proposed amendments to rule 53 make a number of minor changes to give the master greater discretion over the time and location of hearings. Rule 53(e)(1) no longer requires filing of the transcript if one has not been prepared, and rule 53(e)(2) permits any party to obtain a transcript before a hearing on exceptions.

B. Application of the Rules to Inferior Courts

Determining the applicability of particular civil rules to inferior courts can be a complex process; in most cases, however, application of the basic principles in rule 81 can furnish the appropriate solution. Rule 81 states:

> These rules, or any of them, shall apply to every trial court of civil jurisdiction within this state, within the limits of the jurisdiction and powers of the court provided by law, and the procedure therein shall conform to these rules insofar as practicable. They shall apply insofar as practicable in magistrate's courts, probate courts, and family courts to the extent they are not inconsistent with the statutes and rules governing those courts. In any case where no provision is made by statute or these Rules, the procedure shall be according to the practice as it has heretofore existed in the courts of this State.[132]

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126. *Id.* at 644, 320 S.E.2d at 711. The court reasoned that the right of appeal is not a power granted to a master, but rather a right conferred upon a party. This right, then, could only be abrogated pursuant to a specified statutory provision. *Id.* at 645-46, 320 S.E.2d at 712.

127. *Id.* at 645, 320 S.E.2d at 712.

128. S.C. CODE ANN. § 14-11-60 (Supp. 1984).

129. *Id.*

130. S.C. CODE ANN. § 15-31-150 (Supp. 1984).

131. *Id.*

132. RULE 81, SCRCP.

An examination of the probate court, which has limited jurisdiction and numerous applicable rules and statutes, will afford an excellent illustration of the effect of rule 81.

1. *Relationship Between the New Rules and Existing Rules and Statutes Governing the Probate Courts*

Stated affirmatively, the second sentence of rule 81 means that the existing probate rules and statutes[133] remain in effect and take precedence over the circuit court rules. Although the South Carolina Court Register contains rules for probate procedure, these relate only to administrative matters and, therefore, have no effect on probate procedure.[134]

Although there are no current rules of probate procedure affecting the operation of the circuit court rules, statutes that prescribe procedure for probate courts do override the new rules. For example, section 18-5-20 of the South Carolina Code[135] directs that notice of intention to appeal to the circuit court be filed within fifteen days of judgment in the office of the probate court. Rule 74, which covers some of the same procedures, requires that the notice of intention to appeal be served on the other parties within ten days after receipt of the written notice of the judgment and filed with the clerks of both the inferior court and the court to which the appeal is taken. The specific statute establishing procedure in the inferior courts supersedes the provisions of the circuit court rule.

Practitioners must be familiar with both the new rules and the probate court statutes because the circuit court rules govern

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133. Two classes of statutes must be distinguished: those actually governing probate court practice and those governing specific actions, but incidentally addressing court procedure. The former class comprises the "statutes" addressed by rule 81. The provisions in the latter class are not "statutes . . . governing [probate] courts" and are subordinate to the new rules. *See infra* notes 142-47 and accompanying text.

134. Rule 1 is untitled and concerns the reuse of tapes used to record proceedings in the probate court. The titles of the remaining rules are descriptive: *Duty of Probate Judge* (rule 2); *Procedures to be Handled in Processing Probate Matters, Maintaining Records, and Submitting Reports of the Court* (rule 3); *Procedures for Ending Defunct Cases* (rule 4). The Probate Court Practice Rules, first enacted in 1879 and republished in the 1976 South Carolina Code, were repealed by implication in 1978 when the supreme court adopted the South Carolina Court Register, which did not include those rules.

135. S.C. CODE ANN. § 18-5-20 (1976).

some matters not specifically provided for in the probate court statutes. Several probate statutes, for example, require service of the summons and complaint in the same manner as if in circuit court. Thus, the new rules, including the new provision for service by mail of the summons and complaint in rule 4,[136] govern this procedure in probate courts. Other rules, such as rule 6, governing computation of time,[137] control in probate litigation simply because no probate rule or statute specifically addresses that subject.

In some cases, the new rules are more flexible than the statutes governing the inferior courts, but are not inconsistent with them. For example, Code section 14-23-330[138] authorizes the probate judge to issue a commission to depose a person whose testimony is needed in the case. This procedure is more cumbersome than the deposition procedure in rule 30, but since the rule does not contradict the statute, probate judges are not bound to follow the procedure in the statute. In the absence of conflict, the court could and should authorize the more flexible procedure permitted in the rules when it expedites the case, provided that it is "practicable" and does not expand the jurisdiction of the court.

2. *Jurisdiction and "Practicability" Limitations on Applying the New Rules to the Probate Court*

The major problem facing both court and counsel is determining when a particular circuit court rule should *not* be applied in an inferior court. Rule 81 contains two general restrictions. The first limitation is that the circuit court rules apply to a trial court only "within the limits of the jurisdiction and powers of the court provided by law."[139] Thus, the powers of an inferior court cannot be expanded merely because a circuit court rule authorizes a new procedure. For example, rule 18 authorizes a plaintiff to join any claim he might have against any defendant, regardless of whether the various claims are factually or legally related. This rule does not, however, authorize the pro-

136. *See supra* notes 7-29 and accompanying text.
137. *See supra* notes 7-40 and accompanying text.
138. S.C. CODE ANN. § 14-23-330 (1976).
139. RULE 81, SCRCP.

bate court to entertain claims that are beyond its probate jurisdiction.

The second limitation is found in the first two sentences of rule 81, which both provide that the circuit court rules apply in the probate courts "insofar as practicable." This language confers on the judge the power to determine whether a new rule is "practicable" in the individual case. The rule fails to provide any definition of practicability, but the judge must certainly consider such factors as the cost to litigants, delay in the basic proceedings, prejudice to the parties, and the appropriateness of the forum.

Among the major innovations introduced by the new rules are the more liberal joinder and discovery procedures,[140] which have the potential, in some circumstances, to expedite cases and reduce costs for the litigants. Rule 28, for example, now permits a party, whether or not a case is pending, to employ depositions to preserve testimony that otherwise might be lost through death or disability. Yet the use of these depositions, as well as of other discovery procedures such as discovery conferences and general interrogatories, is inappropriate in many cases. The practicability limitation in rule 81 permits an inferior court judge to require justification before approving the use of any procedure now authorized under the new rules. Consequently, the judge can deny the use of discovery procedures if they are too expensive, seem designed to harass, or unduly enlarge the case. The judge's power to determine the rules' applicability is necessary to prevent the use of rules designed for general litigation in courts of limited jurisdiction.

3. *Effect of Prior Practice on Applying the New Rules*

The last sentence of rule 81 states: "In any case where no provision is made by statute or these Rules, the procedure shall be according to the practice as it has heretofore existed in the courts of this State."[141] This rule applies to any situation not

140. Joinder of claims is virtually unlimited and joinder of parties is restricted only by the requirement that at least one claim of each party arise out of the same transaction or occurrence asserted in the main action. The rules also authorize general interrogatories, depositions upon written questions, and medical examinations. *See generally* H. LIGHTSEY & J. FLANAGAN, *supra* note 35, at 171-90, 297-341.

141. RULE 81, SCRCP.

covered by rule or statute, as well as situations when application of the rules would be "impracticable" or would expand the jurisdiction of the probate court. For example, once a court has acquired jurisdiction of a person, prior practice indicates that a rule to show cause may be the appropriate pleading to bring a matter before the court, even though this pleading is not authorized by the new rules or by an existing rule or statute of the inferior court.

4. The New Rules and Procedural Provisions Within Existing Statutes

Problems also arise in attempting to reconcile procedural provisions contained in specific statutes with the new rules. Code section 15-19-210[142] provides a useful example of the types of problems that can arise and how they can be resolved. This statute appears to permit the complaint to be served after the summons in an attachment proceeding and requires the defendant to answer within twenty days.[143] This interpretation presents two problems. First, the new rules make no provisions for a summons served separately from a complaint. The repeal of Code section 15-13-230,[144] which provided that the complaint did not need to be served with the summons, indicates that the circuit court rules now govern this issue. Thus, under rule 4(d), "The summons and complaint must be served together."[145] The second problem is the inconsistency between the statute and rule 12(a). The statute requires an answer within twenty days of service of the complaint, while rule 12(a) allows thirty days. Since section 3 of the repealing statute,[146] as well as the South

142. S.C. CODE ANN. § 15-19-210 (1976).

143. This statute provides in part:

> Immediately upon issuance of the warrant . . . the sheriff or constable shall execute such warrant and the plaintiff, if the defendant shall not have been served with a copy of the complaint with the summons, shall within ten days after being required so to do by the defendant serve a copy of the complaint in the action on the defendant or his attorney . . . . The defendant shall have twenty days thereafter to answer the complaint . . . .

S.C. CODE ANN. § 15-19-210 (1976).

144. S.C. CODE ANN. § 15-13-230 (1976)(repealed 1985).

145. RULE 4(d), SCRCP.

146. 1985 S.C. Acts 277, No. 100.

Carolina Supreme Court's order promulgating the new rules,[147] provides that the new rules control any prior inconsistent statutes, rule 12(a) controls and a thirty-day period is allowed.

5. *Distinguishing Substance and Procedure in Applying the New Rules*

A final issue arises from the provision in the repealing statute that the new rules of procedure "may [not] be construed to affect the substantive legal rights of any party to any civil litigation in the courts of this State but shall affect only matters of practice and procedure."[148] The general proposition that procedure should not affect substantive rights is clear, and the new rules are almost always procedural. The distinction between substance and procedure, however, is not always easily drawn.

One situation that illustrates both the difficulty and the effect of drawing this distinction arises in shareholder derivative actions. The subject is addressed both in rule 23(b)(1) and in Code section 33-11-290,[149] which are generally coextensive. Rule 23(b)(1), however, states that the plaintiff must plead that an attempt was made to obtain shareholder approval prior to filing suit, while Code section 33-11-290 makes no mention of this requirement.[150] The statute can be viewed as solely procedural because it applies only to suits brought in South Carolina, regardless of the state of incorporation, and does not affect litigation involving South Carolina corportions in other jurisdictions.[151] If Code section 33-11-290 is solely procedural, then rule 23 governs because the new rule takes precedence over a prior procedural statute. Alternatively, some jurisdictions have viewed the shareholder demand as a requirement of substantive corporate law.[152] Although the demand is a pleading requirement, it can also be considered a necessary element of the cause of action, the absence of which defeats recovery. If demand is viewed as a matter of substantive corporate law, then Code section 33-11-290 gov-

147. Order of the South Carolina Supreme Court (April 10, 1985).

148. 1985 S.C. Acts 277, No. 100 § 3.

149. S.C. CODE ANN. § 33-11-290 (Supp. 1984).

150. *See also* Adams, *The 1981 Revision of the South Carolina Business Corporation Act*, 33 S.C.L. REV. 405, 406-10 (1982).

151. *Id.*

152. *See, e.g.*, Zapata Corp. v. Maldonado, 430 A.2d 779 (Del. 1980).

erns and the procedural requirements of rule 23(b)(1) must yield. Fortunately, neither this nor similar conflicts between the new rules and substantive law are likely to arise very often; yet this example illustrates the kinds of problems that may occur under the new rules.

IV. THE NEW RULES AND THE SOUTH CAROLINA SUPREME COURT

A. The Time Within Which an Appeal Must Be Taken

The new rules on post-trial motions for directed verdict, judgment *non obstante veredicto* (n.o.v.), and new trial all state that "[t]he time for appeal for all parties shall run from the time of entry of the order granting or denying such motion."[153] This language suggests that the time for filing a notice of intention to appeal may commence with the entry of judgment[154] rather than with the receipt of notice, as provided under supreme court rule 1.[155] As a result, the new rules create an ambiguity in appellate procedure that can lead to unfortunate consequences because timely notice of the intent to appeal is necessary for appellate jurisdiction.[156]

A close reading of the relevant rules, however, reveals that the ambiguity is more apparent than real. Broadly interpreted, the rules can be read to mean that the time for appeal commences with the entry of judgment: The new rules do not define the period during which an appeal must be taken; this subject is addressed only by Supreme Court Rule 1, which requires that the appellant file notice of intention to appeal within ten days after the receipt of notice of the judgment or order or after the rising of the lower court.[157] Read together, the circuit court rules and Supreme Court Rule 1 provide that the notice to appeal can be filed no earlier than the entry of judgment and no later than ten days after written notice of the relevant action or post-trial

153. RULES 50(e), 52(c), 59(f), SCRCP.

154. FED. R. APP. P. 4(a)(1).

155. S.C. SUPR. CT. R. 1.

156. *See, e.g.*, First Carolina Nat'l Bank v. A & S Enters., 272 S.C. 339, 251 S.E.2d 762 (1979); Miller v. State, 269 S.C. 113, 236 S.E.2d 422 (1977).

157. S.C. SUPR. CT. R. 1 § 1 refers to the rising of the court, but RULE 6, SCRCP eliminates the term of court as a reference point in computing time.

motions.

Alternatively, if the new rules are read narrowly, they merely preserve the traditional rule that the filing of a post-trial motion destroys the finality of the judgment and stays the time for all parties to appeal. This interpretation restricts applicability of the new rules to matters relevant to the circuit courts, which do not include the time to appeal. This reading is consistent with the other provisions of the rules governing post-trial motions, which are concerned only with the circuit court's procedure and jurisdiction to decide post-trial motions.[158]

Whichever interpretation is chosen, the period of time within which notice of intent to appeal must be filed is determined by statute and by the supreme court rules, not by the new rules of civil procedure. This is the preferable approach because it prevents appellate procedure from being indirectly affected by the adoption of the rules and is consistent with rule 73, which states: "Procedure on appeal to the Supreme Court of South Carolina shall be in accordance with the Rules of the Supreme Court."[159] This problem illustrates the need to coordinate the civil and appellate rules. A committee has been formed to revise the appellate rules and will, no doubt, address this problem and several others discussed in this section. In addition, the proposed amendments to rules 50, 52, and 59 now make it clear that the time to appeal commences upon receipt of written notice of the order on the post-trial motions.

B. Appealable Matters

Rule 72, dealing with judgments and orders subject to appeal, affects the procedure in the supreme court, as well as the substance of the material that can be reviewed. The note to rule 72, following the notes to the 1958 Judicial Council draft, candidly states that the rule "is designed to reduce appeals from interlocutory or intermediate orders in an action."[160] The Judicial Council recognized that the rule affected the statute governing appellate jurisdiction in law cases,[161] but contemplated

158. H. LIGHTSEY & J. FLANAGAN, *supra* note 35, at 377-409.
159. RULE 73, SCRCP.
160. RULE 72, SCRCP advisory committee note.
161. S.C. CODE ANN. § 14-3-330 (1976)(formerly § 15-123).

that a revision of that statute would be submitted to the legislature along with the rules.[162] Since no revised statute was submitted, the adoption of rule 72 raises the possibility of conflict between the rule and the statute. The crucial question is whether the supreme court intended to change its authority to review interlocutory orders when it adopted the new civil rules.

Much of rule 72 is consistent with the statute. The first sentence, sections (1) and (3), and the last paragraph of the rule reflect exactly the comparable provisions in Code section 14-3-330.[163] Other portions, however, can be read to expand, reduce, or stabilize appellate jurisdiction. For example, rule 72(4) authorizes, for the first time, an interlocutory appeal on issues of personal and subject matter jurisdiction. The rule's second sentence limits appeals to six types of interlocutory orders, fewer than the interlocutory appeals "involving the merits" or "affecting a substantial right" authorized under prior law.[164] Finally, rule 72(6) permits an interlocutory appeal from any "other judgment or order appealable by statute,"[165] suggesting that the number of appealable interlocutory orders remains unchanged. This ambiguity again emphasizes the need to resolve the scope of the new rules and their effect on appellate practice.

Certainly, the supreme court has the authority to affect appellate practice through the civil rules. The South Carolina Constitution[166] authorizes the court to promulgate all rules of practice and procedure, provided that they are submitted to the general assembly and not disapproved by three-fifths of each house. Moreover, the order promulgating the rules and the repealing statute specifically provide that the rules control over any remaining inconsistent statute.[167] Thus, the supreme court could change its practice even though a statute on the subject

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162. RULE 72, SCRCP, notes 2, 4 (Jud. Council Draft 1958).

163. S.C. CODE ANN. § 14-3-330 (1976).

164. *See* S.C. CODE ANN. § 14-3-330(1), (2)(1976). Both of these tests are ambiguous, but generally a matter "involves the merits" when it necessarily affects the judgment and "affects a substantial right" when it effectively forecloses a party from contesting the case on the merits. SOUTH CAROLINA BAR, SOUTH CAROLINA APPELLATE PRACTICE HANDBOOK V-5 to V-6 (1985).

165. RULE 72(6), SCRCP.

166. S.C. CONST. art. V, § 4.

167. *See* Order of Supreme Court (April 10, 1985)(promulgating the new rules to become effective July 1, 1985); 1985 S.C. Acts 277, No. 100 § 3 (repealing statutes inconsistent with the new rules).

remained in the South Carolina Code.

It is inferable, however, that the supreme court did not intend to change its practice through these rules despite its power to do so and the language of rule 72. The first sentence of rule 81 provides that the rules "apply to every *trial* court of civil jurisdiction within this state . . . ."[168] Rule 82(a) states that these rules do not "extend or limit the jurisdiction of *any* court of this State . . . ."[169] In addition, rule 73 states that the procedure on appeal shall be governed by the supreme court rules, rather than the new rules, which are designated in rule 85(a) as the South Carolina Rules of Civil Procedure. The supreme court's appointment of a committee to consider revisions of the supreme court rules suggests that the court carefully distinguishes between the two sets of rules.

For these reasons, the better view is that the new civil rules do not affect the appeal of interlocutory orders. This interpretation is certainly consistent with rule 72(6), which preserves existing statutory authorization for interlocutory appeals, but appears to conflict with rule 72(3), which seems to expand review. A definite resolution must await either a specific appellate rule or an opinion holding that jurisdictional issues "involve the merits" or "affect a substantial right."

C. The Scope of Review

Another problem is created by the third sentence of rule 52(a), which states: "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."[170] This language should cause no problem when the appellate court reviews findings of fact in law cases. Under South Carolina case law, the lower court's findings will not be disturbed unless no evidence exists that reasonably supports the findings.[171] Similarly, no problem arises when the findings of fact made by a master or referee are confirmed by the circuit judge

168. RULE 81, SCRCP (emphasis added).
169. RULE 82(a), SCRCP (emphasis added).
170. RULE 52(a), SCRCP.
171. Townes Assocs. v. City of Greenville, 266 S.C. 81, 86-87, 221 S.E.2d 773, 775 (1976).

since under the well-established "two-judge" rule, the lower court's findings will not be disturbed unless no evidence supports them.[172] Both these standards are equivalent to the "clearly erroneous" standard in rule 52(a).[173]

When, however, the circuit court fails to confirm the master's or referee's finding, in an action in equity, a problem does arise. Since the "two-judge" rule does not apply, the appellate court may find the facts according to its own views of the preponderance of the evidence.[174] This standard is broader than the "clearly erroneous" standard, and no amount of semantic juggling can reconcile the language of rule 52 with prior practice. Since there is substantial reason to believe that the supreme court did not intend the civil rules to affect appellate practice,[175] rule 52 should not be read to affect the scope of review. In addition, the South Carolina Constitution specifically authorizes a broad appellate review of findings of fact in equity cases.[176] Thus, the narrower scope of review in rule 52 could be construed as unconstitutional. For these reasons, the scope of review should remain the same as under prior practice despite the language of rule 52. The proposed amendment to rule 52 deletes this sentence and, if adopted, will completely resolve the problem.

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172. *Id.* at 86, 221 S.E.2d at 775-76.

173. The United States Supreme Court stated: "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948). Other federal courts have used tests that are similar to the "no reasonable evidence" standard used by the South Carolina courts. *See, e.g.*, Shapiro v. Rubens, 166 F.2d 659, 666 (7th Cir. 1948); Cleo Syrup Corp. v. Coca-Cola Co., 139 F.2d 416, 417-18 (8th Cir. 1943). It is an interesting question of semantics whether these tests are materially different.

174. Townes Assocs. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976).

175. *See supra* notes 168-69 and accompanying text.

176. S.C. CONST. art. V, § 5.